Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards For Interstate Special Access Services	)	CC Docket No. 01-321
	)	
Petition of US West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate US West's Provision of Federally Tariffed Interstate Services	)	CC Docket No. 00-51
	)	
Petition of Association for Local Tele-Communications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149
	)	
2000 Biennial Regulatory Review-Telecommunications Service Quality Reporting Requirements	)	CC Docket No. 00-229
	)	
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services	)	RM 10329

REPLY COMMENTS OF BELLSOUTH CORPORATION

BELLSOUTH CORPORATION

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REPLY COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), hereby submits its Reply Comments in response to the comments filed in

response to the *Notice of Proposed Rulemaking* ("*Notice*") released on November 19, 2001 in the above referenced proceeding.[1]

I. INTRODUCTION AND SUMMARY

1. The Commission is at a crossroads. It can continue on the path toward increased competition and reduce regulation or it can embark on a road of re-regulation attendant with its missteps, miscalculations and disincentives. This proceeding has a surrealistic quality because the issue, special access performance measures, represents a level of regulation of interstate services that has no precedent. After twenty years of policies designed to increase competition and reduce regulation, it is startling to believe that the Commission would abruptly change course and embrace a regulatory scheme that is more intrusive than any other approach ever employed by the Commission.

2. Advocates of special access performance standards assert three arguments that purportedly would justify Commission action: (1) special access is not competitive; (2) inadequate UNE rules force competitors to use special access; and (3) ILECs discriminate in the provision of special access. As shown in this reply, none of these arguments have merit.

3. With regard to the competitiveness of the special access market, none of the competitors offer any substance to support their assertions that competitive alternatives do not exist. In contrast, BellSouth submitted a report by The Eastern Management Group that showed competitors had alternatives to ILEC provided special access and that the marketplace is able to provide any level of service performance for which there is sufficient demand.

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[1] *In the Matter of Performance Measurements and Standards for Interstate Special Access Services, et al*., CC Docket No. 01-321, *Notice of Proposed Rulemaking*, FCC 01-339 (rel. Nov. 19, 2001) ("*Notice*").

4. Stripped of the rhetoric, the only fact that commenters offer the Commission as justification for taking the extreme regulatory action of mandating special access performance measures is that they use special access services in competition with the ILECs. Such use, however, does not evidence a lack of competitive alternatives—instead, it reflects a business decision and an economic choice. Competitors' business decisions should not become the basis of Commission action.

5. No more compelling is the commenters' complaints that the Commission's UNE rules "force" them to use special access services. The Communications Act does not give competitors unqualified access to unbundled network elements. Instead, the Act only requires access to UNEs that are necessary and where failure to provide access would impair a carrier's ability to provide service. The Commission, as it must, in its UNE determinations has given substance to the necessary and impair standard of the Act. In any event, whether or not commenters like the UNE rules has no bearing on special access services nor do their opinions create a basis upon which the Commission can justify imposing UNE-type performance standards on special access. Just because a competitor makes a business decision to use ILEC special access rather than an alternative does not mean that special access should be treated like a UNE. To do so would contravene the Commission's objectives that its unbundling rules should favor facilities based competition because such rules foster investment and innovations and permit the Commission to reduce regulation.

6. Finally, commenters attempt to justify regulatory mandated special access standards by arguing that they are necessary to prevent ILEC discrimination in favor of their retail customers. BellSouth, in its comments, showed that this speculative argument of the commenters made no economic sense. Moreover, there has been a process in place to redress

grievances that commenters may have regarding an ILEC's performance in its provision of special access service—a Section 208 complaint. The current situation is not one in which this remedial procedure is flawed or has failed to function; instead, it has never been used. To discard this process along with its due process and fundamental fairness principles when it has never been tried, in favor of an entirely new and intrusive regulatory regime, is unwarranted and unsound.

II. PERFORMANCE MEASUREMENTS ARE INAPPROPRIATE FOR SPECIAL ACCESS SERVICES.

7. Commenters attempt to portray special access as essential to their ability to compete with ILECs. Not unexpectedly, they raise arguments such as the lack of alternatives to ILEC-provided special access or the inadequacy of the Commission's UNE rules. Nevertheless, anything more than a superficial reading of these comments quickly reveals that the commenters' laments ring hollow. Is the Commission to seriously consider statements that there are no competitive alternatives in Chicago[2] or that WorldCom (who is in the business of being a carriers' carrier), AT&T and others cannot build out facilities to their customers? And, even if these statements were accurate, they simply do not provide a basis for the Commission to enact the draconian regulatory measures advocated by these parties.

8. The reality is that competitors choose to use special access services—they do not have to use them. Just because a competitor makes the choice to use special access services, that election does not convert special access service into the equivalent of a UNE. Yet, proponents of special access performance measures advocate that the Commission adopt a regulatory approach

[2] Comments of Focal Communications Corporation, Pac-West Telecom, Inc., and US LEC Corp. at 12 ("Focal Comments" or "US LEC Comments").

that parallels the regulation of UNEs. Such a regulatory regime, which would be unprecedented in its intrusiveness on common carrier operations, cannot be reconciled with the competitive market that exists or with the Commission's and the Telecommunications Act's pro-competitive policies.

A. Special Access Services Are Competitive.

9. Many competitors argue that special access performance standards are justified because ILEC special access services are necessary inputs for the competitive services that they provide.[3] Other than their assertions, the commenters offer little to support their proposition.[4]

10. In stark contrast to these comments, BellSouth submitted with its comments a report prepared by The Eastern Management Group ("EMG") on special access competition. In the expert opinion of EMG, the number of competitors offering special access has grown steadily and dramatically over the last fifteen years. EMG further concludes that purchasers of BellSouth's special access services are likely to have multiple choices of competitive alternatives and that the marketplace is able to provide any level of service performance for which there is sufficient demand.

11. The market reality is vastly different than that portrayed by the proponents of special access performance standards. BellSouth, in conjunction with Verizon and SBC, filed a Joint

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[3] *See, e.g.*, Comments of the Association for Local Telecommunications Services at 6-9 ("ALTS Comments"); Comments of AT&T Corporation at 4-8; Comments of Time Warner Telecom and XO Communications, Inc. at 4-7 ("Time Warner/XO Comments"); Comments of WorldCom, Inc. at 5-6.

[4] Indeed, the proposition that performance measures for special access is essential is called immediately into question when these same commenters advocate that such measures only be applied to a very selective group of ILECs. The advocacy of special access performance standards amounts to little more than a poorly disguised attempt to use the regulatory forum to place (selected) ILECs at a competitive disadvantage.

Petition to eliminate the mandatory unbundling requirement for high capacity loops and dedicated transport.[5] As the Joint Petitioners showed, special access competition has been around for nearly 20 years and CLECs are formidable competitors with seven billion dollars in annual revenues and a market share of 36 percent.[6] Competition is so widespread that markets generating 80 percent of BOC special access revenue qualify for Phase I pricing flexibility and markets generating nearly two-thirds of such revenues qualify for Phase II relief.[7]

12. As competition has grown, CLECs have built 218,000 local fiber miles and 645 fiber networks in the top 150 MSAs. The densest MSAs often have fifteen or more competing fiber networks and 77 of the top 100 MSAs have at least three.[8] These alternative facilities are not just connecting to ILEC central offices but also connect to buildings where there is demand for high capacity services. It is estimated that competitive networks already connect to office buildings accounting for 20 million business access lines with additional locations being added continuously.[9] Thus, these competitive network providers target and establish networks in areas where special access and high capacity users are concentrated.

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5 On April 5, 2001, BellSouth, Verizon and SBC ("Joint Petitioners") filed a Petition for the Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport in CC Docket No. 96-98. Joint Petitioners filed Reply Comments ("JPRC") on June 25, 2001.

6 JPRC at 2.

7 *Id.*

8 *Id.*

9 *Id.* at 3.

13. It is evident that ILEC competitors have been successful. In an attempt to blunt their competitive successes, some commenters argue that they cannot expand their market presence without ILEC special access.[10] Again, the facts belie these claims.

14. In conjunction with Reply Comments of the United States Telecom Association ("USTA") Dr. Robert W. Crandall submitted an expert analysis that showed that CLEC facilities already exist close to locations housing businesses that account for the vast majority of the demand for dedicated, high-capacity loops and special access services.[11] Given where competitive networks are already deployed and the pattern of extensions that competitors have made, Dr. Crandall showed it would be economically rational for competitors like CLECs to continue to build out to additional end user locations.[12]

15. Commenters have not introduced any information that refutes the competitiveness of the special access marketplace. In tacit recognition of the weakness of their argument that there are no alternatives to ILEC special access services, some commenters take the tack that the classification of ILECs as dominant carriers diminishes the competitiveness of the special access market. Thus, these commenters are quick to point out that in the *Pricing Flexibility Order*[13] the Commission did not declare the ILECs non-dominant carriers. In the commenters' view, the

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10 *See, e.g.*, Time Warner/XO Comments at 9-10; Comments of MPower Communications Corp at 12.

11 Reply Comments of the United States Telecom Association, CC Docket No. 96-98, filed April 30, 2001, Reply Declaration of Robert W. Crandall at 6-7, 18 *et seq.* ("Crandall Reply Declaration").

12 Crandall Reply Declaration at 5, 7, 34.

13 *In the Matter of Access Charge Reform, et al.*, CC Docket No. 96-26, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order"*).

failure to declare the ILECs non-dominant justifies increasing the regulation of the ILECs by imposing special access performance standards on them.

16. Even the selective reading of the *Pricing Flexibility Order* in which the commenters engage cannot support increasing the regulation of special access services. Although the commenters are in denial, the fact remains that the *Pricing Flexibility Order* recognizes the competitiveness of the special access market and that the presence of competition warrants reduced regulation.[14] Although the Commission did not confer non-dominant status on the ILEC with regard to its provision of special access, it did establish a comprehensive regulatory program that reduced regulatory intervention commensurate with demonstrated levels of competition. Having granted BellSouth Phase I pricing flexibility for dedicated transport and special access in 39 MSAs and Phase II pricing flexibility in 38 MSAs, it would be impossible to reconcile the extraordinary regulatory intrusion represented by mandatory special access performance measures with the Commission's own view of pricing flexibility where its purpose was to extract itself from the regulation of the ILEC's business of providing special access services.

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[14] The Commission affirmed its view that granting pricing flexibility was for the purpose of reducing regulation because of competition:

> More recently, as competition in the provision of interstate access services increased, the Commission recognized that many incumbent LECs remained subject to significant regulatory constraints. Accordingly, the Commission's *Pricing Flexibility Order* granted pricing flexibility to incumbent LECs subject to price cap regulation, once certain competitive thresholds were met, to increase their ability to respond to competition in this market. The *Pricing Flexibility Order* designed a framework to provide greater flexibility to incumbent LECs and to facilitate the removal of services from price cap regulation as competition developed in the exchange access market, while ensuring that these LECs could not use this flexibility to engage in anticompetitive behavior. (footnotes omitted)

In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, CC Docket No. 01-337, *Notice of Proposed Rulemaking*, (FCC 01-360), released Dec. 20, 2001, ¶12.

17. The *Pricing Flexibility Order* was a comprehensive, self-adapting framework that decreased regulation commensurate with increasing levels of competition. Having determined that sufficient competition exists to grant pricing flexibility, it is incongruous to suggest, as some commenters do, that the Commission can superimpose a regulatory scheme of mandated performance measures that is more restrictive and intrusive than that which existed prior to the adoption of the *Pricing Flexibility Order.*

18. Pricing flexibility aside, there simply is no reason for the Commission to introduce a level of regulation that has never before been imposed on an interstate access service. The proponents of special access measures have not provided the Commission with any credible facts that would justify the Commission's reversal of its regulatory course and the abandonment of the pro-competitive policies it has followed for decades.

19. Stripped of the rhetoric, the only fact that commenters offer the Commission as justification for taking an extreme regulatory action and mandating special access performance measures is that they use special access services in competition with the ILECs. Such use, however, does not evidence a lack of competitive alternatives—instead, it reflects a business decision and an economic choice.

20. Contrary to the apparent wishes of the ILECs' competitors, their use of special access should not result in the creation of "UNE-type" regulations for special access services. In using special access, the competitors are exercising an economic prerogative. Having made these choices independently, the competitors should not be afforded extra-economic rewards established by regulators. Such unearned rewards distort the market in two ways. First, they favor specific competitors over competition, which is a result that is precisely the exact opposite of long standing Commission policy. Second, it chills innovation and choice. For example,

Williams Communication offers Private Line Quality of Service. The Private Line Quality of Service offers four options (Platinum, Gold, Silver and Bronze) with varying pricing and service level agreements, depending on the needs of its customers.[15] If the Commission mandates performance metrics, the Commission is essentially taking away from the ILEC the ability to compete in the same way that Williams is addressing market demand. Further, if the Commission, in creating the metrics and associated regulations, "gets it wrong," which is a highly likely regulatory outcome, it can undermine the market by distorting the two key characteristics upon which competitors compete—price and quality.

B. Commenters' Dissatisfaction With UNE Rules Does Not Justify Imposition of Special Access Performance Standards.

21. Another argument some commenters use to justify imposition of special access performance standards is the claim that they are "forced" to employ special access because of the limitations that the Commission has placed on UNEs regarding commingling or extended loop transport.[16] These arguments fall flat for a number of reasons.

22. As an initial matter, the Commission's determinations regarding UNEs reflects that the Communications Act does not give unqualified access to unbundled network elements. Instead, the Act only requires access to UNEs that are necessary and where failure to provide access would impair a carrier's ability to provide service. The Commission, as it must, has given substance to the necessary and impair standard of the Act.

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[15] Attachment 1 is a Williams Communications advertisement for Private Line Quality of Service.

[16] ALTS Comments at 7-8; AT&T Comments at 4-8; Time Warner/XO Comments at 12-15; WorldCom Comments at 21-24; Comments of Competitive Telecommunications Association at 3-5 ("CompTel Comments").

23. To the extent commenters disagree with the Commission's UNE determinations, the Commission has provided them with a forum to advocate their positions. The Commission has commenced a rulemaking proceeding for the purpose of conducting a comprehensive evaluation of its unbundling rules.[17]

24. Nevertheless, whether or not commenters like the UNE rules has no bearing on special access services nor do their opinions create a basis upon which the Commission can justify imposing UNE-type performance standards on special access. The commenters' arguments are nothing more than another attempt to transform special access services into UNE-equivalents.

25. These arguments, however, do not alter the fact that special access services are competitive and that CLECs have a wide range of alternatives in how they compete with incumbents that include UNEs, resale, self-provisioning and the services of competitive network providers. In the face of these alternatives, it would be unjustified to begin treating special access as if it were a UNE and impose performance standards. Just because a competitor makes a business decision to use ILEC special access does not mean that special access should be treated like a UNE. Indeed, to do so would contradict the Commission's standing objective that its unbundling rules should favor the development of facilities based competition because such rules would provide the incentives for all industry participants to invest and innovate and would allow the Commission to reduce regulation.[18]

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[17] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *Notice of Proposed Rulemaking*, FCC 01-361, released Dec. 20, 2001 ("*Trienial Review NPRM*").

[18] *Triennial Review NPRM*, ¶9.

26. A variation on the commenters' dissatisfaction theme is that they are "forced" to use special access services because they often encounter situations where no facilities are available and that the ILECs have no obligation to construct UNEs. For example, Time Warner/XO argue that "[w]here CLECs cannot rely on their own loop facilities, however, new construction is often needed. The FCC has, at least for now, apparently acquiesced in the ILECs' construction of their obligation (or lack thereof) to construct UNEs."[19] In the commenters' view, in the absence of available UNEs or an ILEC duty to construct, they have no choice but to purchase special access.

27. As a threshold matter, BellSouth has voluntarily included in its standard interconnection agreement, which any CLEC may adopt, the following provision:

> To the extent available within BellSouth's network at a particular location, BellSouth will offer Loops capable of supporting telecommunications services. If a requested loop type is not available, and cannot be made available through BellSouth's Unbundled Loop Modification process, then <<customer_name>> can use the Special Construction process to request that BellSouth place facilities in order to meet <<customer_name>>'s loop requirements. Standard Loop intervals shall not apply to the Special Construction process.[20]

28. Even if BellSouth did not voluntarily agree to specially construct UNE high capacity loops were facilities were not available, the fact that UNE loops are not available at a particular location does not justify the imposition of performance standards on special access. CLECs have other alternatives including self-provisioning. CLEC arguments that they cannot self-provision are in reality a statement that they are making a business decision to employ the services of the ILEC rather than to make a capital investment. The fact that the CLEC finds it in its economic interest to use ILEC special access services rather than to choose self-provisioning or an

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19 Time Warner/XO Comments at 12.

20 BellSouth has negotiated a variety of variations to this clause that have been included in approved interconnection agreements, including that of XO.

alternative supplier's services cannot serve as a reason for the Commission to establish a regulatory scheme that treats ILEC special access services as if they are UNEs.[21]

C. Claims Of Discrimination Or That Special Access Service Has Deteriorated Lack Merit.

29. The laments regarding service performance are equally suspicious. For the most part, the comments are anecdotal recitations regarding the performance failures (*e.g.*, installation or maintenance) or complaints regarding the ordering process. Overhanging these allegations is the basic question of why these commenters have not pursued their complaints with the Commission. AT&T states that it has raised performance issues regarding interstate special access services with state commissions, but seems chagrinned at the fact that state commissions have not acted because of jurisdictional limitations.[22] US LEC complains it has endured extraordinary outages, but has chosen not to seek redress with the Commission.[23] Time Warner references a request that a complaint against BellSouth be considered on the Commission's accelerated docket. Time Warner's request was denied, and Time Warner did not pursue its complaint.

30. It is far easier to complain than it is to prove that an ILEC has acted unreasonably, as these comments demonstrate. Time Warner's comments are a case in point. They present their

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[21] Equally uncompelling are wireless carriers claims that their use of special access services somehow merits the imposition of performance standards. Wireless carriers' asserted dependence on special access services, like that of CLECs, stems from a business decision where the wireless carriers have determined that it is in their economic interest to use ILEC services rather than to build-out their own networks with their own facilities. The wireless carriers economic choice cannot translate into a regulatory imperative for the imposition of onerous performance standards on ILECs. Nor should the Commission distort the operation of the competitive marketplace and create pecuniary rewards that market forces simply do not support.

[22] AT&T Comments at 21-22.

[23] US LEC Comments at 11.

litany as if they have demonstrated unreasonable conduct on BellSouth's part. Contrary to Time Warner's belief, none of their allegations amounted to a cognizable claim under Section 208 of the Communications Act. For example, Time Warner argues that BellSouth has missed Time Warner's customer desired due date (CDDD) on a quarter of its orders for 1999 and for January through September 2000.[24] Customer desired due date is the date the customer would like to have the service installed. It is not the committed service date. The service date is the date that BellSouth returns to the customer on the Firm Order Confirmation ("FOC") and represents BellSouth's committed customer due date under its access tariff. Section 5.1.1(E) of BellSouth's access tariff unambiguously states that "[t]he service date is the date service is to be made available to the customer and billing will commence."[25] Indeed, BellSouth provides a Service Installation Guarantee on DS1 and DS3 special access services.[26] Under the Service Installation Guarantee, BellSouth "assures that orders for services to which the Service Installation Guarantee applies will be installed and available for customer use no later than the Service Date . . . ."[27] If BellSouth fails to meet the Service Date, the customer receives a credit equal to the nonrecurring charges associated with the service that was ordered.[28]

31. Despite the fact that the service date represents the date that BellSouth commits to install service and that Time Warner was made fully aware of this fact during the proceedings

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[24] Time Warner/XO Comments at 49.

[25] BellSouth Telecommunications Inc., Tariff F.C.C. No. 1, § 5.1.1(E), 10th Revised Page 5-1-1.

[26] BellSouth Telecommunications Inc., Tariff F.C.C. No. 1 § 2.4.9.

[27] BellSouth Telecommunications Inc., Tariff F.C.C. No. 1, § 2.4.9(A), 2nd Revised Page 2-49.0.19.

[28] This provision was added as a result of the competitive pressures and demands of the marketplace.

before the Enforcement Bureau on its request for accelerated docket treatment, Time Warner argues that in 1999, BellSouth met its committed date for only 76 percent of Time Warner's orders compared to 85 percent of the orders for all BellSouth special access orders. As it did in its request for accelerated docket treatment, Time Warner again erroneously compares its customer desired due date percentages to metrics based on Service Date. A proper comparison, *i.e.*, one based on committed service date, shows that for 1999, the percent of Time Warner's orders completed on or before BellSouth's committed service date was 92 percent.

32. Time Warner also reprises its flawed accelerated docket claim that BellSouth failed to provide it with timely documentation regarding the status of its orders.[29] It erroneously asserts that BellSouth is obligated to provide an FOC (Firm Order Confirmation) within 48 hours after it receives an Access Services Order ("ASR"). Time Warner's conclusion is predicated on a mistaken view that BellSouth's *Guide To Interconnection*, which BellSouth provides as an aid for its access customers, alters the provisions of its access tariff. It does not.[30] Even if that were not the case, the *Guide to Interconnection* merely states that return of an FOC within 48 hours is a BellSouth target—it is not a BellSouth commitment, as Time Warner attempts to characterize it.

33. Time Warner continues with its faulty arguments by repeating its claim regarding when an FOC is changed to PF (Pending Facility) status. It argues that there are times in which an FOC, which has an committed due date (*i.e.*, Service Date), will be changed to PF status either the day before or the day on which service is to be installed. Using the same ploy it used

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29 Time Warner/XO Comments at 50.

30 *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998).

in its accelerated docket request, innuendo through selective use of italicized type, Time Warner attempts to attach a nefarious motive on the part of BellSouth for the change in status. As BellSouth explained in response to Time Warner's accelerated docket request, when a technician goes to install a circuit, he or she may discover that the facilities are in need of repair or that a mistake was made and the facilities are not actually available. These circumstances are normal business occurrences and not the result of any deficiency in BellSouth's ordering procedures. Further, when such occurrences happen, BellSouth compensates Time Warner through its Service Installation Guarantee.

34. About the only thing Time Warner's comments get right is that its accelerated docket request was denied and that it was free to file a Section 208 complaint. Time Warner, like virtually every other commenter who complains about ILEC special access services, has not done so. Instead, the tack has been and continues to be to lobby the Commission to enter the field and establish an unprecedented regulatory scheme to govern the installation and maintenance of an interstate service. To paraphrase Sherlock Holmes, "the game is afoot."[31] If the Commission can be lured into the game, these commenters are hopeful of obtaining superior services for free, of obtaining unearned cash transfers and of hamstringing the competitiveness of the ILECs.

35. There has been a process in place to redress grievances against ILECs—a Section 208 complaint. This is not a situation where the remedial procedure is flawed or has failed to function — the process has not been used. To discard it, along with the due process and

[31] If there is any doubt that this has become a game, the Commission need only review the tortured reasoning of the proponents for only applying the performance standards and proposed penalties to the four or five largest ILECs.

fundamental fairness principles that are embodied in the complaint procedures, when it has never been tried, is unwarranted and unsound.

III. THE COMMISSION'S AUTHORITY TO ESTABLISH SELF-EFFECTUATING PENALITIES IS HIGHLY CIRCUMSCRIBED.

36. For proponents of mandatory performance standards, a key element is that the Commission create self-effectuating penalties which should be comprised of substantial forfeitures as well as penalty payments to be made directly to purchasers of special access service. To make this money transfer system work, these commenters envision new requirements that will require ILECs to prepare and file new service quality monthly reports. These commenters, while excellent at detailing to the nth degree every performance measure they want and every report they expect to be filed, fall well short of explaining the authority under which the Commission can lawfully act.

37. Many commenters suggest that the Commission must establish monthly special access service reports regarding service quality.[32] In support of this reporting requirement, some commenters proclaim that since the report would be duplicative of the information set forth in ARMIS service quality reports, the annual ARMIS report could be eliminated.[33]

38. BellSouth agrees that the proposed new monthly reports and the ARMIS reports would be duplicative. Commenters, however, fail to recognize that the Telecommunications Act of 1996 limited the frequency of ARMIS reports to once a year. Thus, the Commission cannot, under the guise of special access performance standards, change the name of the ARMIS service quality report and require that it be filed on a monthly basis. If the Commission is going to

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32 Time Warner/XO Comments at 23; AT&T Comments at 26.

33 *See, e.g.*, Time Warner/XO Comments at 53.

continue to require service quality reporting, the Commission does not have the authority to require that such reports be filed more than once a year.

39. Several commenters urge the Commission to adopt a multi-tiered penalty system. The first tier would consist of payments to carriers. Commenters suggest a variety of forms that such payments could take, such as credits for recurring and nonrecurring charges, discounts on charges and, liquidated damages.[34] While commenters are imaginative in conjuring up payments that they should receive, they are not as effective in brewing up the authority by which the Commission is to establish these self-executing payments.

40. The Communications Act bounds the Commission's actions. While the Commission may prescribe rates and regulations that would apply to interstate services, such prescription must be just and reasonable. Accordingly, the Commission cannot arbitrarily establish credit mechanisms or rate discounts that are unrelated to the service outage actually experienced by the customer and the amount that the customer has paid for the service. Even to the extent that the Commission were able to devise a mechanism that could pass statutory muster, the Commission must permit ILECs to recover the cost of the mechanism because such costs are incurred for the provision of service. Anything less would be an expropriation of ILEC property in violation of the 5th Amendment of the Constitution.

41. Similarly, the Commission has no authority to prescribe liquidated damages. The commenters who point to interconnection agreements as authority for the use of liquidated damages miss the point. There is a significant difference between negotiated interconnection agreements and the Commission's prescription authority. Indeed, under the Communications

[34] *See, e.g.*, Focal Comments at 20; Time Warner/XO Comments at 25; Comments of AT&T Wireless Services, Inc. at 16 ("AT&T Wireless Comments").

Act, parties are free to negotiate agreements that are inconsistent with the provisions of the Communications Act. The Commission, however, is not free to act in a manner inconsistent with statute. While a person can bring a complaint against a carrier and the Commission may award actual damages that the complainant proves, the Commission has no authority to award phantom damages, liquidated damages or punitive damages. No commenter has provided any competent authority to show otherwise.

42. Likewise, the Commission's forfeiture authority is limited. As BellSouth explained in its comments, the Commission must "take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[35] The language of this statutory provision is mandatory, not discretionary. Accordingly, the Commission, in order to meet its obligations under Section 503, must evaluate each and every violation using the statutory criteria before it may determine a forfeiture amount. A predetermination of forfeiture penalties flies in the face of the statute's express requirements and could not withstand judicial scrutiny.

43. Even where the Commission follows the appropriate steps in determining a forfeiture amount, payment of the forfeiture cannot be self executing. As Qwest points out:

> The assessment of fines, forfeitures, monetary penalties and damages by the Commission is severely curtailed by the Communications Act, which ensures that no monetary penalty may be demanded of a carrier unless full due process has been afforded in that particular instance. In fact, no monetary penalty can be enforced against a carrier in the absence of a full judicial proceeding at which the carrier has the right to challenge on a *de novo* basis the Commission's finding that

[35] 47 U.S.C. § 503(b)(2)(D).

> a penalty is due. Imposition of 'automatic' damage awards or 'baseline' forfeiture amounts would violate these legal constraints and be unlawful.[36]

44. Although some commenters urge the Commission to establish self-executing forfeitures, such a mechanism cannot meet statutory muster. The statute (Section 503(b)(3)) requires both notice and full opportunity for hearing before the Commission can impose a fine. The requirement for a hearing is simply at odds with the notion of baseline forfeiture amounts or similar self-executing devices.

IV. CONCLUSION

45. Competition or regulation — that is the choice that confronts the Commission. Make no mistake; mandated special access performance measures do not promote competition. They may well favor specific competitors, but as the Commission has long recognized, the interests of competition do not equate to the interests of individual competitors. Nothing has been presented to the Commission that would warrant the abandonment of its long standing policies to promote competition and reduce regulation. BellSouth urges the Commission to choose competition.

Respectfully submitted,

BELLSOUTH CORPORATION

By: /s/ Richard M. Sbaratta
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Date: February 12, 2002

[36] Comments of Qwest Communications International Inc. at 11.

BellSouth Reply Comments

Attachment 1

Private Line Quality of Service

Pioneering a new concept in private line services, Williams Communications Private Line Quality of Service (PL QoS) enables customers to choose a class of private line to fit their unique business needs, while taking advantage of the latest in technological advances. With our PL QoS, customers can select from four private line models rather than one level of service.

How It Works

Prior to the availability of PL QoS, customers had to adapt their bandwidth needs to the service provider's architecture. With PL QoS, our architecture conveniently adapts to fit most customers' applications. Utilizing best-in-class optical switching technology, we provide a restorable architecture that reliably transports your mission-critical data. This technology, deployed to serve major metropolitan areas, offers a range of restoration options for Williams Communications' private line products, DS-3 through OC-12c.

Williams Communications is the only company to successfully combine the capabilities of mesh restoration with Telcordia™ compliant switch times in a single platform. Our PL QoS product offers a range of options, allowing you to choose the best fit for your application. By transporting traffic via optical meshed connectivity, customers receive scalability, flexibility, and a variety of pricing and service level agreement (SLA) options not available from carriers utilizing traditional SONET rings.

Services

Williams Communications has four levels of service offerings, backed by enhanced SLAs with real credits, for its PL QoS customers.

Platinum

Recommended for applications where high reliability and fast switching times are paramount to other considerations, Williams Communications' Platinum service offers the highest quality and availability.

- 100.00 percent availability*
- Full route diversity, automatic protection switching and ability to dynamically re-route around multiple simultaneous fiber cuts
- Restoration from 20 milliseconds to 180 milliseconds
- Industry-leading SLAs

Gold

Our standard private line offering, Gold service, is a lower cost alternative to the Platinum level and is recommended for ATM, IP, voice and general data trunking, and any application where restoration times are less of a constraint.

- 99.997 percent availability*
- Primary and back-up route diversity
- Mesh restoration
- Restoration from 200 milliseconds to two seconds
- Industry-leading SLAs

Silver

Recommended for applications not requiring additional protection, Williams Communications' Silver service is unprotected, but will not be pre-empted.

› 99.50 percent availability
› Used to tie together customer-owned switching equipment
› Industry-leading SLAs

Bronze

The most economical offering, Bronze service, is a restorable service that can be pre-empted.

› Availability objective of 99.00 percent
› Re-routes if capacity is available
› Used for carrier diversity and lower-priority data trunking

Benefits

Multiple Data Rates

We offer a wide range of data rates for your applications: DS-3, OC-3, OC-3c, OC-12 and OC-12c.

True Path and Electronic Diversity

By providing true path and electronic diversity, we give customers access to a secure network and high-circuit availability.

Multiple QoS

With four categories of PL QoS, you purchase only the services that are right for your network applications.

Faster Provisioning

Industry-leading provisioning intervals enable faster revenue accrual for your business.

Concatenation

Concatenation reduces SONET overhead, allowing for more efficient use of available capacity.

** Excludes switch times*

Powered by our next-generation fiber-optic network — the nation's largest with connectivity to five continents — and a commitment to cultivating breakthrough technologies, Williams Communications can make anything global, local. Our heritage includes a proven track record of pioneering services such as frame relay and optical wave, and television transmission using a switched fiber-optic network. We have the connectivity, infrastructure and expertise to enable the success of bandwidth-centric businesses around the globe.

WE HAVE. WE CAN. WE WILL.

Williams COMMUNICATIONS

www.williamscommunications.com
1.866.GO.TO.WCG

CERTIFICATE OF SERVICE

I do hereby certify that I have this 12th day of February 2002 served the following parties to this action with a copy of the foregoing **REPLY COMMENTS OF BELLSOUTH CORPORATION** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

/s/ Juanita H. Lee
Juanita H. Lee

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